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692865—46——1

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 1006

CONTINENTAL OIL COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 24–31) is reported in 62 F. Supp. 876.

JURISDICTION

The judgment of the court below was entered November 5, 1945. (R. 31.) On December 19, 1945, the petitioner filed a motion for a new trial which was overruled on January 7, 1946. (R. 31.) This petition for a writ of certiorari was filed March 27, 1946. (R. 49.) The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTIONS PRESENTED

1. Did the Court of Claims correctly determine the taxpayer's invested capital for the year 1920?

2. Is the petitioner entitled to interest on the overpayment determined by the Court of Claims in addition to that allowed by the court under the particular circumstances involved?

STATUTES AND REGULATIONS INVOLVED

The applicable portions of the pertinent statutes and regulations are set forth in the Appendix, *infra*, pp. 13–18.

STATEMENT

The special findings of fact of the Court of Claims (R. 10–23) may be summarized as follows:

Petitioner, Continental Oil Company, is a Delaware corporation with its principal office and place of business in Ponca City, Oklahoma. (R. 10.) Prior to April 30, 1929, it was known as Marland Oil Company which by written agreement of that date acquired all of the assets of the Continental Oil Company of Maine in exchange for shares of its own capital stock. (R. 13.)

Continental Oil Company of Maine, mentioned above, was known as Mutual Oil Company prior to some time in 1925, and prior to December 22, 1921, was known as Elk Basin Consolidated Petroleum Company. (R. 13.) The taxes involved herein are those of the Elk Basin Consolidated Petroleum Company and its affiliates for the year

1920. Prior to January 6, 1920, that corporation was known as Elk Basin Petroleum Company which was organized December 11, 1916, with an authorized capital stock of 400,000 shares. On November 6, 1919, this was increased to a million shares, and again increased to three million shares on January 6, 1920. (R. 17.)

The par value of the capital stock of Elk Basin Consolidated Petroleum Company was $5 per share and the capital stock of Elk Basin Petroleum Company also had a par value of $5 per share. (R. 17.)

As of January 1, 1920, Elk Basin Petroleum Company acquired all of the outstanding capital stock of two other corporations, Grass Creek Petroleum Company and Keoughan-Hurst Drilling Company, in exchange for 600,000 shares of its own capital stock in the respective amounts of 133,333⅓ shares and 466,666⅔ shares. (R. 12.)

On March 15, 1920, Elk Basin Consolidated Petroleum Company acquired all of the outstanding capital stock of Mutual Oil Company of Maine and all the outstanding stock of each of Mutual Oil Company's three subsidiary corporations in exchange for 600,000 shares of its own stock. On March 15, 1920, and prior thereto Mutual Oil Company of Maine had as subsidiaries and owned all of the outstanding capital stock of Mutual Oil Company of Arizona, Mutual Refining and Producing Company, and Northwestern Oil Refining Company. (R. 12.)

On March 15, 1921, Elk Basin Consolidated Petroleum Company, hereinafter referred to as the taxpayer, filed its completed federal consolidated income and excess profits tax return for the calendar year 1920. That return included its own income and the income of Grass Creek Petroleum Company, Keoughan-Hurst Drilling Company, Mutual Oil Company of Maine, Mutual Oil Company of Arizona, Mutual Refining and Producing Company, and Northwestern Oil Refining Company for the entire calendar year 1920. The tax and interest shown due on the return were duly assessed and paid. (R. 11.)

The Commissioner of Internal Revenue audited the above-mentioned return and determined that it erroneously included the income of Mutual Oil Company of Maine and its three subsidiaries for the period January 1 to March 14, 1920. The Commissioner held that there were two different and separate affiliated groups of corporations; that the change in affiliation required a separate computation for the first fractional part of the year 1920; that a separate consolidated return should have been filed for the period January 1 to March 14, 1920, by the Mutual Oil Company of Maine for itself and its three subsidiaries; and that its income for that period should not have been included in the taxpayer's return. (R. 11–12.)

As a result of these adjustments, the Continental Oil Company of Maine received a 60-day let-

ter proposing to assess a deficiency. An appeal was taken to the United States Board of Tax Appeals; the case was twice before the Court of Appeals of the District of Columbia and this Court had denied certiorari. The litigation ultimately terminated in the Government's favor in 1944. No question as to that deficiency is involved in this proceeding, although both involve the same tax year. (R. 14.)

On March 9, 1925, a claim for refund was filed by the Elk Basin Company for the calendar year 1920 in the amount of $200,707.45, setting forth that the taxpayer was entitled to a refund resulting from an overstatement of taxable income and an overstatement of invested capital made by the Commissioner. (R. 15.)

Upon the examination of the refund claim filed March 9, 1925, the Commissioner of Internal Revenue determined an overpayment of tax by the Elk Basin Company in the sum of $12,779.97 and duly issued a certificate of overassessment therefor, together with a check in such amount, plus accrued interest thereon of $4,475.09. That check was rejected and returned by the Continental Oil Company of Maine to the Commissioner, together with the certificate of overassessment. The check and the certificate were subsequently cancelled and the money repaid into the Treasury of the United States. In making that determination, the Commissioner computed a consolidated net income of $1,084,800.52, and a consoli-

dated invested capital as adjusted of $7,926,731.74. The Commissioner in this determination allowed an amount of $5,726,775.95 as representing the value of the acquisitions of Grass Creek Petroleum Company, Keoughan-Hurst Drilling Company, and Mutual Oil Company of Maine and subsidiaries. (R. 15–16.)

An application was later made to reopen and reconsider the claim for refund which was granted pending final decision of the appeal to the Board of Tax Appeals, mentioned above. After the Board proceedings were concluded, the claim for refund was reconsidered and rejected in full by the Commissioner on December 13, 1941. (R. 16.)

Stock of the Elk Basin Petroleum Company and Elk Basin Consolidated Petroleum Company was traded on the New York Curb Exchange in the years 1919 and 1920. Quotations taken from the New York Times and from the Financial & Commerce Chronicle show that for the week ending January 2, 1920, 8,600 shares of Elk Basin Petroleum Company stock were sold at a low of $8½ and a high of $9 per share; that for the week ending March 19, 1920, 12,700 shares of the stock of Elk Basin Consolidated Petroleum Company were sold at a low of $10 and a high of $10¾ per share and that on March 15, 1920, an unknown number of shares were traded at a low of $9 and a high of $11¼ per share. (R. 17–18.)

During the autumn of 1919, the firm of C. H. Pforzheimer & Company, brokers and dealers in securities, was an active dealer in the stock of Elk Basin Petroleum Company, both in the capacity of broker and trader. That firm had formed a syndicate to deal in the Elk Basin stock and in November and December 1919 sold 200,000 shares at $7.50 per share. In December 1919 that firm also acquired 100,000 shares of the capital stock of Keoughan-Hurst Drilling Company at $8.50 per share. This was part of a plan whereby Elk Basin Petroleum Company was to acquire all of the outstanding capital stock of Keoughan-Hurst Drilling Company and Grass Creek Petroleum Company. (R. 21–22.)

In July 1920 Elk Basin Consolidated Petroleum Company, the taxpayer, filed its federal capital stock tax return, reporting 1,800,000 shares of capital stock outstanding with a par value of $5 per share. The Commissioner proposed an additional tax based upon an increased value for the capital stock. (R. 22.) The taxpayer replied by letter dated October 26, 1921, under oath, stating in substance that par value of its stock should be used rather than the quoted Curb market value for a number of reasons, among which was the alleged fact (R. 23)—

> that the market quotations for Elk Basin stock were not a fair criterion of its value since the block of stock exchanged for the securities of the Mutual Oil Company

> (600,000 shares) had been placed in escrow and remained so and that the block of stock exchanged for the Keoughan-Hurst stock had also been placed in escrow and that the market quotation of the Elk Basin stock was thus maintained at a higher level than would have been the case had the entire number of shares been subject to sale; * * *.

And further (R. 23)—

> that the market for the Elk Basin stock on the New York Curb was strongly supported by certain New York Curb brokers, who, by furnishing a ready and strong market for this stock, maintained its price at considerably above the value reflected by the books of the corporation.

The Commissioner thereafter accepted these statements and accepted the capital stock tax return and the value therein reported of $5 per share as correct. (R. 23.)

The Court of Claims found that the consolidated invested capital of the Elk Basin Consolidated Petroleum Company for the calendar year 1920 after giving effect to all adjustments, including the acquisitions of stock on January 1 and March 15, 1920, was in the amount of $7,926,731.74 (R. 23), and gave judgment accordingly for the petitioner in the amount of $12,156.99 with interest (R. 24).

ARGUMENT

1. The principal question is the determination of the taxpayer's invested capital for the calendar

year 1920. This depends upon the amounts to be included therein on account of the acquisitions of stock of other corporations on January 1 and March 15, 1920. The determination of invested capital under the earlier Revenue Acts based in part on the value of property paid in for stock, is no longer of any general importance. Under the last excess profits tax, which was repealed by Section 122 (a), Revenue Act of 1945, Public Law 214, 79th Cong., 1st Sess., the criterion for invested capital was the tax basis of property paid in, rather than its value. See Section 718, Internal Revenue Code (26 U. S. C. 1940 ed., Sec. 718).

The holding of the court below that the values allowed by the Commissioner of Internal Revenue in his computation, as evidenced by the certificate of overassessment which was later cancelled, represented reasonable additions to invested capital on account of the actual value of the property paid in, is in accordance with the evidence introduced in this case and with the facts as set forth in the court's findings. As the court points out, these values were based on the best evidence available. The record before this Court (R. 1–49), does not establish that the court erred in accepting these values and does not afford any basis for any other method of computation or for reversal of the court's findings.

The statute requires that the actual cash value of the property paid in be employed. The prop-

erty paid in consisted of certain corporate shares, but taxpayer's entire case here is based upon the view that it is entitled to employ the value of the stock which was issued for the property paid in. It is true that such an expedient is sometimes resorted to (Cf. *Budd International Corp.* v. *Commissioner,* 143 F. 2d 784 (C. C. A. 3d), certiorari denied, 323 U. S. 802), but here there has been no showing that it was not possible to prove the actual cash value of the property paid in. The court below assumed, without deciding, that the expedient might be resorted to here. (R. 28.)

Even on that assumption, the Court of Claims was clearly correct in rejecting the Curb Market prices alone as an appropriate method for determining value. The Court of Claims pointed out the artificiality of those prices in the peculiar setting of this case (R. 28–29), and that on another occasion the taxpayer itself had successfully urged that they were not a reliable guide.

2. The court below allowed a refund based on a computation using the same invested capital as that used by the Commissioner of Internal Revenue in the certificate of overassessment issued in 1925 and a net income of $1,087,025.43,[1] which was slightly less than that used by the Commissioner. This resulted in a refund of $12,156.99 upon which the court allowed interest at 6% per

[1] This was the amount that the parties stipulated in this proceeding as the correct net income. (R. 30.)

annum from December 16, 1921, the date of payment of the tax, to a date "not later than 30 days preceding the issuance of the refund check which plaintiff rejected, which interest was a part of the interest of $4,475.09 heretofore tendered by defendant." (R. 24.) Petitioner contends that under Section 177 (b) of the Judicial Code, as amended by Section 808 of the Revenue Act of 1936 (Appendix, *infra*), it is entitled to interest on the principal amount from the date of payment to a date preceding the date of the refund check, i. e., the check in payment of the judgment allowed by the court, by not more than 30 days. This allowance would give the petitioner interest of over 144% on an amount which was tendered to it but which it refused to accept. The court's judgment allows interest of approximately 36%, since the refund check was issued on November 14, 1927.[2] This would be the same rate of interest which the Commissioner allowed in his computation of the overpayment. Since the taxpayer had been tendered the amount which the court ultimately determined it was entitled to but refused to accept it, and since Section 177 (b), as amended, recognizes the principle that a tender stops the running of interest, we submit that there has been a substantial compliance with the statute.

[2] This date does not appear in the record in the court below but has been verified from the files of the Bureau of Internal Revenue.

CONCLUSION

The petition presents no substantial basis for certiorari; it should be denied.

Respectfully submitted.

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Solicitor General.

SEWALL KEY,
Acting Assistant Attorney General.

J. LOUIS MONARCH,
ELIZABETH B. DAVIS,
Special Assistants to the Attorney General.

MAY 1946.

APPENDIX

Revenue Act of 1918, c. 18, 40 Stat. 1057:

SEC. 325. (a) That as used in this title—

* * * * *

The term "tangible property" means stocks, * * *.

SEC. 326. (a) That as used in this title the term "invested capital" for any year means (except as provided in subdivisions (b) and (c) of this section);

(1) Actual cash bona fide paid in for stock or shares;

(2) Actual cash value of tangible property, other than cash, bona fide paid in for stock or shares, at the time of such payment, but in no case to exceed the par value of the original stock or shares specifically issued therefor, unless the actual cash value of such tangible property at the time paid in is shown to the satisfaction of the Commissioner to have been clearly and substantially in excess of such par value, in which case such excess shall be treated as paid-in surplus: *Provided,* That the Commissioner shall keep a record of all cases in which tangible property is included in invested capital at a value in excess of the stock or shares issued therefor, containing the name and address of each taxpayer, the business in which engaged, the amount of invested capital and net income shown by the return, the value of the tangible property at the time paid in, the par value of

the stock or shares specifically issued therefor, and the amount included under this paragraph as paid-in surplus. The Commissioner shall furnish a copy of such record and other detailed information with respect to such cases when required by resolution of either House of Congress, without regard to the restrictions contained in section 257;

(3) Paid-in or earned surplus and undivided profits; not including surplus and undivided profits earned during the year;

(4) Intangible property bona fide paid in for stock or shares prior to March 3, 1917, in an amount not exceeding (a) the actual cash value of such property at the time paid in, (b) the par value of the stock or shares issued therefor, or (c) in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding on March 3, 1917, whichever is lowest;

(5) Intangible property bona fide paid in for stock or shares on or after March 3, 1917, in an amount not exceeding (a) the actual cash value of such property at the time paid in, (b) the par value of the stock or shares issued therefor, or (c) in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding at the beginning of the taxable year, whichever is lowest; *Provided,* That in no case shall the total amount included under paragraphs (4) and (5) exceed in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding at the beginning of the taxable year; * * *.

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 808. INTEREST ON JUDGMENTS.

Section 177 (b) of the Judicial Code, as amended, is amended to read as follows:

"(b) In any judgment of any court rendered (whether against the United States, a collector or deputy collector of internal revenue, a former collector or deputy collector, or the personal representative in case of death) for any overpayment in respect of any internal-revenue tax, interest shall be allowed at the rate of 6 per centum per annum upon the amount of the overpayment, from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue. The Commissioner is hereby authorized to tender by check payment of any such judgment, with interest as herein provided, at any time after such judgment becomes final, whether or not a claim for such payment has been duly filed, and such tender shall stop the running of interest, whether or not such refund check is accepted by the judgment creditor." (28 U. S. C. 1940 ed., Sec. 284.)

Internal Revenue Code:

SEC. 3771. INTEREST ON OVERPAYMENTS.

(a) *Rate.*—Interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the rate of 6 per centum per annum.

(b) *Period.*—Such interest shall be allowed and paid as follows:

(1) *Credits.*—In the case of a credit, from the date of the overpayment to the

due date of the amount against which the credit is taken, but if the amount against which the credit is taken is an additional assessment of a tax imposed by the Revenue Act of 1921, 42 Stat. 227, or any subsequent Revenue Act, then to the date of the assessment of that amount.

(2) *Refunds.*—In the case of a refund, from the date of the overpayment to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner, whether or not such refund check is accepted by the taxpayer after tender of such check to the taxpayer. The acceptance of such check shall be without prejudice to any right of the taxpayer to claim any additional overpayment and interest thereon.

* * * * *

(26 U. S. C. 1940 ed., Sec. 3771.)

Treasury Regulations 45 (1920 ed.):

ART. 862. [as amended by T. D. 4102, VI–2 Cum. Bull. 291–292 (1927)] *Purchase of stock.*—Where a corporation either directly or indirectly, as for example through a trustee, purchases its own stock, either for the purpose of retiring or of holding it in the treasury or for other purposes, the cost of such purchase to an amount equal to the capital paid in to the company for such stock must be deducted from the aggregate invested capital from the date of such purchase. Where any such purchase is made within the first 60 days of the taxable year, any sum paid in excess of the above amount will be deemed to have been made from earnings or profits accumulated during pre-

ceding taxable years; but any such excess paid in such a purchase which occurs during the remainder of the taxable year will be deemed to have been made from the earnings or profits accumulated between the close of the preceding taxable year and the date of payment, to the extent of such earnings or profits. See article 857. The full amount derived in cash or its equivalent from the resale of such stock may be included in invested capital from the date of such resale. See article 542.

ART. 864. *Affiliated corporations: invested capital.*—The invested capital of affiliated corporations, as defined in section 240 (b) of the statute and article 633, for the taxable year is the invested capital of the entire group treated as one unit operated under a common control. As a first step in the computation a consolidated balance sheet should be prepared in accordance with standard accounting practices, which will reflect the actual assets and liabilities of the affiliated group. In preparing such a balance sheet all intercompany items, such as intercompany notes and accounts receivable and payable, should be eliminated from the assets and the liabilities, respectively, and proper adjustments should be made in respect of intercompany profits or losses reflected in inventories which at the beginning or end of the taxable year contain merchandise exchanged between the corporations included in the affiliated group at prices above or below cost to the producing or original owner corporation. Such consolidated balance sheet will then show (a) the capital stock of the parent or principal company in the hands of the

public; (b) the consolidated surplus belonging to the stockholders of the parent or principal company; and (c) the capital stock, if any, of subsidiary companies of which substantially all the capital stock is not owned or controlled by the parent or principal company, together with the surplus, if any, belonging to such minority interest. In computing consolidated invested capital the starting point is furnished by the total of the amounts shown under (a), (b), and (c) above. * * *

ART. 868. *Affiliated corporations: stock of subsidiary acquired for stock.*—Where stock of a subsidiary company was acquired with the stock of the parent company, the amount to be included in the consolidated invested capital in respect of the company acquired shall be computed in the same manner as if the net tangible assets and the intangible assets had been acquired instead of the stock. If in accordance with such acquisition a paid-in surplus is claimed, such claim shall be subject to the provisions of article 837.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1006

CONTINENTAL OIL COMPANY,
Petitioner,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1006

CONTINENTAL OIL COMPANY,
Petitioner,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The petition of Continental Oil Company respectfully shows to this Honorable Court:

Summary Statement of the Matter Involved

This proceeding involves a claim for refund filed by the petitioner's predecessor, Elk Basin Consolidated Petroleum Company (hereinafter sometimes referred to as "Elk Basin"), to recover an overpayment of income and excess profits taxes made by it for the calandar year 1920. The Court of Claims, in the action brought to enforce the claim, gave judgment for the petitioner in the sum of $12,156.99 only, instead of the sum of $58,419.90 demanded by the peti-

tioner, and furthermore, limited interest on the judgment in violation of Section 177(b), Judicial Code.

Briefly stated, the material facts are as follows:

On January 1, 1920, Elk Basin acquired all the outstanding capital stock of Grass Creek Petroleum Company and of Keoughan Hurst Drilling Company in exchange for 133,333⅓ shares and 466,662⅔ shares, respectively, of its own capital stock issued on that day. Said companies are herein sometimes referred to as "Grass Creek" and "Keoughan Hurst" respectively. Similarly, on March 15, 1920, Elk Basin acquired all the outstanding capital stock of the Mutual Oil Company of Maine, Mutual Oil Company of Arizona, Mutual Refining & Producing Company, and Northwestern Oil Refining Company (hereinafter referred to as "the Mutual Group"), in return for 600,000 shares of its own capital stock which it issued on that day. Throughout the calendar year 1920 Elk Basin and the companies of the Mutual Group continued in existence and conducted their respective businesses.

On March 15, 1921, Elk Basin filed its consolidated income and excess profits tax return for the calendar year 1920, which return included the income of Elk Basin, Grass Creek, Keoughan Hurst and of the Mutual Group and set up the invested capital of the consolidation. The total tax shown to be due on that return was the sum of $200,707.44, which Elk Basin duly paid.

The Commissioner of Internal Revenue, after auditing that consolidated return, determined that the Mutual Group of companies were affiliated with Elk Basin, for federal tax purposes, only from March 15, 1920 to the end of that year; and that for the period January 1, 1920 to March 14, 1920 the Mutual Group constituted by themselves a separate affiliation for tax purposes and that they should have filed their own consolidated tax return based upon the income

and invested capital of that separate affiliation during that two and a half month period. It therefore became necessary to determine what portion of the total income reported by Elk Basin in the return filed by it in March, 1921, was allocable to each of the two taxable affiliations which the Commissioner of Internal Revenue found to be in existence in the year 1920. Such an allocation was finally made, and thereafter a deficiency in taxes for the Mutual Group affiliation was determined by the Commissioner in 1925 and was by him asserted against Elk Basin as transferee of the Mutual Group, whose assets it had by then acquired. Elk Basin was then known as Continental Oil Company of Maine. After extensive litigation the deficiency assessment became final, and in 1944 was duly paid by the plaintiff, Continental Oil Company of Delaware, which corporation had become the successor of the Continental Oil Company (of Maine) in a reorganization of the two companies effected in 1929.

The consequence of the Commissioner's determination was that Elk Basin had overpaid its taxes, for its return filed for 1920 included the income of the Mutual Group for the first two and a half months of that year. Accordingly, the Commissioner of Internal Revenue after examining the claim filed by the Maine corporation in 1925, determined that there had been an overpayment of taxes by Elk Basin in the sum of $12,779.97 and duly issued a certificate of overassessment therefor, together with a check in that amount, plus accrued interest. That check was returned (and subsequently cancelled and the money repaid into the Treasury of the United States) for the reason that in computing Elk Basin's invested capital the Commissioner, instead of giving effect to the cash value of the stocks acquired by Elk Basin on January 1st and on March 15, 1920, considered only what he deemed to be the value of the assets

behind such stocks, and he applied to the tangible property acquired by Elk Basin on the two days in question the limitations on intangible property set forth in subdivision (5), Section 326(a) of the Revenue Act of 1918. An application was made to reopen and reconsider the claim for refund. This was granted but action thereon was deferred by mutual agreement pending final decision of the litigation mentioned above, and after the conclusion of that litigation the claim for refund was reconsidered, and disallowed and rejected in full by the Commissioner on December 13, 1941.

In determining the tax liability of Elk Basin for the calendar year 1920 the amount of its invested capital for that year was the crucial factor and the Court of Claims found that invested capital to be in the amount of $7,926,731.74 including the acquisitions of stock on January 1 and March 15, 1920.

In reaching that decision the Court of Claims ruled that the prices for the Elk Basin stock established by the dealings in that stock on the New York Curb Exchange on the dates in question were not sufficient to substantiate or to justify the finding of a cash value for the Elk Basin stock based on those prevailing prices. Instead the court fixed Elk Basin's invested capital by a reference to the certificate of overassessment which, in turn, considered only the value of the assets underlying the stocks which Elk Basin had acquired on the days in question. Had the market prices of Elk Basin stock been accepted as the criterion for fixing the value of Elk Basin stock, the invested capital of Elk Basin for the calendar year 1920 would have amounted to $11,204,136.88.

Questions Presented

1. Did the Court of Claims err in determining the amount of Elk Basin's invested capital for the calendar year 1920 by reference to the value of the assets underlying the stocks

which it acquired on January 1 and March 15, 1920, rather than by reference to the value of those stocks themselves?

2. Did the Court of Claims err in determining Elk Basin's invested capital for the calendar year 1920 to be only the sum of $7,926,731.74 (Finding No. 19)?

3. Did the Court of Claims err in failing to make any finding as to the market value of Elk Basin stocks on January 1 and March 15, 1920?

4. Did the Court of Claims err in failing and refusing to make the findings of fact requested by the plaintiff to the effect that the cash value of the shares of Elk Basin stock issued by it on January 1, 1920, and on March 15, 1920, were $7.50 and $10⅛ per share, respectively?

5. Did the Court of Claims err in ignoring and refusing to accept as proof of the cash value of the Elk Basin stocks issued by it on January 1 and March 15, 1920, the New York Curb Exchange quotations for those stocks found in Finding No. 14?

6. Did the Court of Claims err in limiting interest on the judgment rendered by it in favor of petitioner to a date not later than 30 days preceding the issuance of the refund check which the plaintiff had rejected?

Reasons Relied On for the Allowance of the Writ

1. The determination of Elk Basin's invested capital by reference to the value of the underlying assets behind the stocks acquired by Elk Basin rather than by reference to the value of those stocks themselves violated Section 326 of the Revenue Act of 1918. While giving lip service to the command of the statute, the Court of Claims in fact and in legal effect considered nothing but the value of the assets

underlying those stocks in determining the additions to Elk Basin's invested capital by reason of its acquisitions on January 1 and March 15, 1920, and in fixing Elk Basin's invested capital at the sum of $7,926,731.74 only. In so doing, the Court of Claims conflicted with its own decision in *United Cigar Stores* v. *United States*, 62 Court of Claims 134. (The writ of certiorari which the government had applied for dismissed on the Solicitor General's confession of error, 275 U. S. 576.) It also conflicted with the decision of the Court of Appeals of the District of Columbia in *Guantanamo Sugar Company* v. *Helvering*, 85 Fed. (2d) 252, and with the decisions of the Board of Tax Appeals (now Tax Court of the United States) in *Regal Shoe Company*, 1 B. T. A. 896, in *Golding Sons Company*, 13 B. T. A. 889, in *Sentinel Publishing Co.*, 8 B. T. A. 325, and in *Merchants National Bank*, 6 B. T. A. 1167.

2. The Court of Claims failed to make any finding as to a material issue in the case, to wit: the market value of Elk Basin shares of stock, although the record is replete with evidence of such value, including admissions made by the Commissioner of Internal Revenue and the defendant's own exhibit. The Court of Claims made an ultimate finding of fact as to the amount of Elk Basin's invested capital but failed to make any finding of fact as to the value of the shares of stock issued by Elk Basin on January 1 and March 15, 1920. The amount of invested capital was dependent on the actual cash value of the stocks of other corporations paid in for Elk Basin stock (Sec. 326(a), Revenue Act of 1918), but a determination of the value of those stocks paid in was impossible unless there was first a determination of the value of Elk Basin's stocks issued in exchange for them, since the value of the stocks acquired is to be determined by the value of the shares issued for them. (*Pierce Oil Corporation* v. *Commissioner*, 32 B. T. A. 403,

430; *Farmers Cotton Oil Company*, 27 B. T. A. 105, 115; *Ambassador Petroleum Company*, 28 B. T. A. 868, 873; *Holmby Corporation* v. *Commissioner*, 28 B. T. A. 1092, 1105; *Seymour Manufacturing Company*, 19 B. T. A. 1280, 1285; *Swiss Oil Corporation* v. *Commissioner*, 32 B. T. A. 777.

3. An ultimate finding of fact of the Court of Claims (Finding No. 19) is not sustained by that court's findings of evidentiary or primary facts (Findings Nos. 14 and 11). Elk Basin's invested capital as found by the court, included the acquisitions of stock on January 1 and March 15, 1920. The amounts at which those acquisitions were included in the invested capital are shown in Finding No. 11. However, Finding No. 14 shows that the value of the stocks issued for those acquisitions (and hence the value of those acquisitions themselves) was considerably in excess of the amount at which they were included in invested capital. This is further proven by Finding No. 11 itself which shows that Grass Creek was included at a valuation of $1,000,000. Since 133,333⅓ shares of Elk Basin were issued for the Grass Creek stock, it is obvious that the Elk Basin shares were valued on that day (January 15) at $7.50 per share, but the Court of Claims failed to value the acquisitions of the Keoughan Hurst shares at that same rate although they were acquired on the same day.

4. In its award of interest, the Court of Claims violated the provisions of Section 177(b) of the Judicial Code which provides that no interest shall be allowed on any claims up to the time of the rendition of judgment by the Court of Claims except that in any judgment of any court for an overpayment in respect of any internal revenue tax, interest shall be allowed upon the amount of the overpayment from the date of the payment thereof to a date preceding the date of the refund check, i. e., the check in payment of

the judgment, by not more than thirty days. The Court was obviously in error in assuming that Section 177(b) of the Judicial Code had been amended by Section 614(a)(2) of the Revenue Act of 1928, as the last named section is not a part of the Judicial Code but is a part of the Internal Revenue Code and deals solely with interest on refunds made by the Commissioner pursuant to statutory authority granted to him.

5. This proceeding raises a question of general importance relating to the interpretation and the administration of the Revenue Laws of the United States. Prior to the present judgment of the Court of Claims the doctrine had been firmly established by the cases cited under the first of these reasons, that it was the value of the stocks paid in to a corporation in exchange for its own shares, rather than the value of the assets underlying those stocks, which was to be considered in determining the corporation's invested capital. The present judgment undermines the rationale of all those decisions. Questions of invested capital are as pertinent under the current Revenue Acts as under the 1918 law, and the doubts raised by this judgment will persist unless and until this court definitely announces the law.

6. This proceeding also raises a question of general importance in the administration of the Revenue Law of the United States, relating to a possible conflict in meaning and application between Section 177(b) Judicial Code (28 U. S. C. A. 284) and Section 3771, Internal Revenue Code. The Court of Claims has patently confused the two sections. This question should be settled by this court.

The Relevant Parts of the Statutes Involved

Revenue Act of 1918

"Sec. 326(a). That as used in this title the term 'invested capital' for any year means (except as provided in subdivisions (b) and (c) of this section):

(1) • • •

(2) Actual cash value of tangible property, other than cash, bona fide paid in for stock or shares, at the time of such payment, but in no case to exceed the par value of the original stock or shares specifically issued therefor, unless the actual cash value of such tangible property at the time paid in is shown to the satisfaction of the Commissioner to have been clearly and substantially in excess of such par value, in which case such excess shall be treated as paid-in surplus; Provided • • •

(3) • • •

(4) • • •

(5) Intangible property bona fide paid in for stock or shares on or after March 3, 1917, in an amount not exceeding (a) the actual cash value of such property at the time paid in, (b) the par value of the stock or shares issued therefor, or (c) in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding at the beginning of the taxable year, whichever is lowest: Provided, that in no case shall the total amount included under paragraphs (4) and (5) exceed in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding at the beginning of the taxable year; but • • •."

"Sec. 325(a). That as used in this title—

• • • • • • •

the term 'tangible property' means stocks, bonds, notes, and other evidences of indebtedness, bills and accounts

receivable, leaseholds and other property other than intangible property."

Judicial Code

"Sec. 284. (Judicial Code, section 177) No interest on claims; exceptions

(a) No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, except as provided in subdivision (b).

(b) In any judgment of any court rendered (whether against the United States, a collector or deputy collector of internal revenue, a former collector or deputy collector, or the personal representative in case, of death) for any overpayment in respect of any internal-revenue tax, interest shall be allowed at the rate of 6 per centum per annum upon the amount of the overpayment, from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue. The Commissioner is hereby authorized to tender by check payment of any such judgment, with interest as herein provided, at any time after such judgment becomes final, whether or not a claim for such payment has been duly filed, and such tender shall stop the running of interest, whether or not such refund check is accepted by the judgment creditor."

Internal Revenue Code

"Sec. 3771. Interest on Overpayments

(a) Rate. Interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the rate of 6 per centum per annum.

(b) Period. Such interest shall be allowed and paid as follows:

(1) Credits. • • •

(2) Refunds. In the case of a refund, from the date of the overpayment to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner, whether or not such refund check is accepted by the taxpayer after tender of such check to the taxpayer. The acceptance of such check shall be without prejudice to any right of the taxpayer to claim any additional overpayment and interest thereon."

WHEREFORE, petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Honorable Court directed to the United States Court of Claims, commanding that Court to certify and send to this Court for its review and determination on a day certain therein to be named, a transcript in accordance with the statute and the rules of this Court of the proceeding in said Court numbered and entitled on its docket "Continental Oil Company, plaintiff, v. United States of America, defendant," No. 45730, and that such judgment of the Court of Claims of the United States may be reviewed by this Honorable Court and that the petitioner may have such other and further relief in the premises as to this Honorable Court may seem just and proper.

CONTINENTAL OIL COMPANY,
Petitioner,

By ARTHUR B. HYMAN,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1006

CONTINENTAL OIL COMPANY,

Petitioner,

vs.

THE UNITED STATES

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Point I

In determining Elk Basin's invested capital by reference to the assets underlying the stocks acquired, the Court of Claims erred and by its error has enshrouded well settled legal principles in doubt.

The legal principles governing the elements of invested capital and the computation thereof have been settled and established by a long line of decisions, and although some of those cases were decided under earlier Revenue Acts, they are equally pertinent and their principles equally applicable to the problems of invested capital arising under the current Revenue Acts.

The Court of Claims, by its judgment in the instant case, has reflected on the authority of those cases and the relevancy of their principles and has left the problems of the make-up and computation of invested capital in hopeless doubt. For the court in fixing the amounts at which Elk Basin's acquisitions of stock on January 1 and March 15, 1920 should be included in invested capital and in determining Elk Basin's invested capital to be the sum of $7,926,731.74, relied on and was guided solely by the certificate of over-assessment (opinion R. 26) and thus perpetuated the error of the Commissioner of Internal Revenue which it conceded it was under a duty to correct.

The Commissioner, in issuing the certificate, disregarded the mandate of Section 326, Revenue Act of 1918, that the actual cash value of the tangible property (which under Section 325 included stocks) paid in for Elk Basin shares should be included in its invested capital. That certificate discussed, computed and gave effect only to the value of the assets underlying the stocks of Keoughan-Hurst, Grass Creek and of the Mutual Group and ignored entirely the values of those stocks themselves (Plaintiff's Ex. 3, Schedule 2, Paragraphs a, b, c). The certificate furthermore applied to the tangible property, i. e., the stocks acquired by Elk Basin on March 1 and on March 15, 1920, the limitations governing intangible property prescribed in subdivision 5 of Section 326A. Indeed, those very paragraphs state frankly that the limitation prescribed for intangibles is being applied to the tangible property which Elk Basin acquired.

By citing its own decision in *United Cigar Stores* v. *United States*, 62 Court of Claims, 134, the Court of Claims recognized the principle that if the tangible property paid in for the taxpayer's stock consists of the shares of another corporation, it is the value of the shares acquired which

must be included in the taxpayer's invested capital, and this is true even though the taxpayer may subsequently acquire the underlying assets of that other corporation. The acquisition of the shares, and the later acquisition of the assets, are two entirely separate and distinct transactions. The court's failure to abide by this principle, established not only by the *United Cigar Stores* case but by the cases of *Regal Shoe Co.*, 1 B. T. A. 896; *Guantanamo Sugar Company* v. *Helvering*, 85 F. (2d) 252; *Golding Sons Company*, 13 B. T. A. 889; *Ralston Steel Car Co.* v. *Commissioner*, 53 F. (2d) 948; *Stutz Motor Car Co.*, 80 F. (2d) 623; *Sentinel Publishing Co.*, 8 B. T. A. 325, makes imperative a review by this court, not merely to right a palpable injustice in the individual case of the Continental Oil Company but to do away with the doubt which must inevitably arise as to the continued authority of the cases which we have just cited and which have never been overruled or their authority questioned until now. The court's decision in the instant case is in irreconcilable conflict with those cases and a definitive settlement of that conflict by this court is essential to intelligent understanding by taxpayers and a proper administration by the courts and the Commissioner of the law which governs the determination of invested capital.

Point II

The Court of Claims failed to make any finding as to a material issue in the case.

The Court of Claims stated correctly that "the entire issue in the case is a relatively simple one: namely, the actual cash value of certain stocks of other corporations paid in for stock of Elk Basin Company." The court failed to meet that issue, however, for it failed to make any finding whatsoever on the question which is deter-

minative of it, to wit: what was the market value of the Elk Basin stock issued on January 1 and on March 15, 1920. This question presented a material issue indeed, for the value of the stocks of other corporations paid in for the Elk Basin stock is dependent upon and is determined solely by the market value of the Elk Basin stocks issued for them.

Repeated adjudication has settled beyond dispute that where a corporation issues its shares of stock in exchange for other property (including the stocks of other corporations) it is the value of the stocks so issued which determines the value of the property acquired. *Pierce Oil Corporation* v. *Commissioner,* 32 B. T. A. 403, 430; *Farmers Cotton Oil Company,* 27 B. T. A. 105, 115; *Ambassador Petroleum Company,* 28 B. T. A. 868, 873; *Holby Corporation* v. *Commissioner,* 28 B. T. A. 1092, 1105; *Seymour Manufacturing Company,* 19 B. T. A. 1280, 1285; *Swiss Oil Corporation* v. *Commissioner,* 32 B. T. A. 777.

The record teems with evidence of the market value of Elk Basin stock on the days in question and this fact renders all the more inexplicable the court's failure to make any finding of fact as to that value. The court's findings included the market prices of Elk Basin stock on the New York Curb Exchange, the market place where willing buyers and willing sellers met to fix prices. Those prices extend over a period commencing nearly three months prior to January 1, 1920 and continuing for some time after March 15, during which period hundreds of thousands of Elk Basin shares changed hands.

The record and the findings are barren of proof that any of the factors to which the Court of Claims referred as casting doubt on the importance of these prices as criteria of value, impeded in any way the free and untrammeled play of the laws of supply and demand on the Curb Exchange. On the contrary, the defendant's own Exhibit F shows that the prices made on that Exchange were the fair market

values of the stock established as a result of supply and demand on an active market place during a period "of great activity in petroleum company stocks" and when "the oil companies were for the most part operating with marked success and their securities were in demand." Furthermore the Commissioner himself recognized and admitted (Plaintiff's Ex. 3, Schedule 2, paragraph a) that Elk Basin shares had a market value on January 1, 1920 of $7.50 per share, and this admission was made at a time when he was already aware of all the facts which the Court of Claims deemed inflationary. The market place furnishes the criterion of value of listed securities. It may not be disregarded at whim or caprice.

The court therefore erred not only in its failure to make any finding whatsoever on this material issue but in its failure to make those findings as to the market value of Elk Basin stock requested by the plaintiff.

Point III

The ultimate finding of fact as to Elk Basin's invested capital (Finding 19) is not sustained by the Court's findings of evidentiary or primary facts (Findings 11 and 14).

The crucial finding of fact which the Court did make was Finding 19 to the effect that Elk Basin's invested capital for the year 1920, including its acquisitions of stock on January 1 and March 1 was $7,926,731.74. The importance of this Finding lies in the fact that on the amount of Elk Basin's invested capital depended its actual tax liability for that year and hence, the amount of the refund to which it was entitled.

But that important finding is not sustained by those findings of evidentiary or primary facts which the Court made (Findings 11 and 14). The amounts at which the acquisitions of the Grass Creek, Keoughan-Hurst and Mutual

Group stocks were included in the invested capital as found are indicated in Finding 11. But it is apparent from Finding 14 (the Curb Exchange prices of Elk Basin stock issued for those acquisitions) that the value of Elk Basin stock (and hence the value of the stocks acquired) was far in excess of the amount at which those acquisitions were included in invested capital. The cases which we have cited under Point II established that it is the value of Elk Basin stock which determined the value of the stocks acquired and hence determines the amounts at which the acquisitions must be included in invested capital.

The court has also found (Finding 11) that the shares of Grass Creek stock were included in invested capital at the sum of $1,000,000. Since Elk Basin issued 133,333⅓ of its own shares for the Grass Crek stock, it is clear that Elk Basin stocks were valued at $7.50 per share on January 1, 1920 and so indeed the Commissioner of Internal Revenue admitted in the certificate of over-assessment (Plaintiff's Ex. 3, Schedule 2, paragraph a). But although the Keoughan-Hurst stocks were acquired on the same day, the shares of Elk Basin stock issued for them on that same day were not accorded the same value as those issued for the Grass Creek stock. Elk Basin's invested capital included both the stocks of Grass Creek and of Keoughan-Hurst and the value of each must be measured by the same standard, to wit: the value of the Elk Basin shares issued for them. When that standard is both applied and disregarded at the same moment in relation to similar transactions, the utlimate finding of Elk Basin's invested capital is without integrity.

Point IV

The Court erred in its award of interest because of its confusion of the Judicial Code with the Internal Revenue Code. Proper Administration of the revenue laws requires that this Court dispel this confusion and reconcile the apparent conflict between sections of the two codes created by the judgment.

It is obvious that the court has confused Section 177(b) Judicial Code with Section 3771, Internal Revenue Code, for its opinion refers to the amendment of Section 177(b) by Section 614(a)(2) of the 1928 Revenue Act. It is on the basis of that supposed amendment that the court limited interest on the judgment as it did. However, Section 177(b) has not been amended by Section 614(a)(2) of the 1928 Act.

The latter section (which is Section 3771, .I R. C.) is a part of the Chapter 37 of the Internal Revenue Code entitled "Abatements, Credits and Refunds" and deals solely with interest on those refunds allowed by the Commissioner himself acting pursuant to the authority granted to him by Section 3770 of the Internal Revenue Code. Section 177(b), on the other hand, is a part of the Judicial Code and deals with interests on judgments awarded by the courts in actions of which they have jurisdiction. The provisions of law controlling the computation and payment of interest in the two different situations were enacted in separate sections with separate headings in the 1926, 1928 and 1936 Revenue Acts and are now found under separate titles of the United States Code. They show the legislative intent to be that they shall apply under entirely different circumstances.

The use of the term "judgment creditor" in Section 177 (b), together with its reference to a refund check in payment of a judgment, indicates that that section refers only to

interest on judgments awarded by the courts, while Section 3771, Internal Revenue Code refers only to interest on refunds made by the Commissioner without litigation. While the provisions of both sections are designed to stop the running of interest, one applies in ministerial proceedings before the Commissioner only, while the other affects judicial proceedings only. *Bonwit Teller* v. *United States*, 52 Fed. (2d) 904; *Mellon* v. *United States*, 36 Fed. (2d) 609. When a claim for refund has been denied in toto and judgment is recovered on the claim, interest runs from the date of overpayment.

The limitation of interest contained in the judgment of the Court of Claims results from its confusion of the two sections. There has thus been created a conflict between them which although apparent rather than real, requires reconciliation and clarification by this court in the interests of a proper understanding of the law by taxpayers and proper administration of it by the Commissioner and by the courts.

Conclusion

We urge this court to grant the writ of certiorari prayed for not only that the plaintiff, Continental Oil Company may have its rights adjudged, in accordance with the statutes in such cases made a provided, but in order to set at rest the doubts and dispel the confusions in the law which the Court of Claims has so needlessly created and thus to aid in the proper administration of the Revenue Laws of the Nation.

Respectfully submitted,

ARTHUR B. HYMAN,
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